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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-109

PRESIDENT'S COUNCIL, DISTRICT 25; JEFFREY BOCHNER, by his next friend Edward Bochner; JEANY LERNER, by her next friend Lee Lerner; IRA DALY, by his next friend Bernard Daly; MARY FINNEGAN; MORRIS REICH; MYRNA SUTZ; JOSEPHINE PEREZ; WALTER MICHAEL; CAROLA MICHAEL; LEA LERNER; BERNARD DALY; RUTH DALY; MERRILL YOUKELES; EVELYN SUSSMAN,

Petitioners,

—against—

COMMUNITY SCHOOL BOARD No. 25; CORMAC K. MEAGHER, individually and as Community Superintendent of Community School District No. 25, and ANTOINETTE MCCARTHY,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF THE AUTHORS LEAGUE OF AMERICA, INC. AS *AMICUS CURIAE*

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Supreme Court, U.S.
FILED
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Respondents.

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

The Authors League of America, Inc. respectfully petitions for leave to file the annexed brief *amicus curiae* in this proceeding. The Authors League is a national society of professional writers and dramatists. One of its principal purposes is to express the views of its members in cases involving the rights of free speech and press. Because determination of the issues involved in this case will significantly affect those fundamental rights, the Authors League respectfully applies for leave to file its brief *amicus curiae.*

Counsel for the Applicant is familiar with the questions involved in this case, and the scope of their presentation, and believes that there is necessity for additional argument on the points specified in the brief.

The right to circulate books, which is protected by the First Amendment (*Bantam Books* v. *Sullivan*, 372 U.S. 58, 65 (1963), is of paramount importance to authors and publishers. Without it, freedom to write and publish can be made meaningless formalities. School libraries and public libraries are the most important means of circulating books to teenage and college students, more so than bookstores. The Circuit Court's opinion places in the hands of local school and library boards unlimited power to infringe that right of circulation by removing or banning from library shelves those books which are repugnant to the personal views of transitory majorities of laymen on these boards.

If District Board No. 25 can remove DOWN THESE MEAN STREETS from its libraries' shelves, then it or any other school or library board—applying only the subjective opinions of its majority—can remove from their library's shelves books of merit which had been chosen by competent professionals. This form of grass roots restraint on free speech is far more pervasive and damaging that the occasional criminal prosecution of a book's publisher or seller, which can be defeated in an adversary judicial procedure. Allowed to go unchecked, it poses a real, not a theoretical, threat to freedom of expression—and freedom to read.

For the reasons set forth in the attached brief, we submit that the Board's order, on its face, violated the First Amendment; and that the Order and the Statute and Regulations which authorized it, were so vague and ambiguous as to violate the First and Fourteenth Amendments.

Because the Authors League of America believes that vital First Amendment rights of authors and publishers are involved, it respectfully requests permission to file the within brief *amicus curiae*.

Respectfully submitted,

IRWIN KARP
Attorney for the Authors League of America, Inc.

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Respondents.

BRIEF OF THE AUTHORS LEAGUE OF AMERICA

Interest of The Authors League

The Authors League, a national society of writers and dramatists, is deeply concerned with preservation of the First Amendment freedoms to write, publish, circulate and read books. The decisions of the Court of Appeals and District Court pose a serious threat to the freedom to circulate books to students through school libraries and public libraries. The Authors League believes that these decisions, and the opinions of the Courts, open the door to widespread grass roots censorship of these libraries.

Summary of Argument

I. The basic issue is whether a transitory majority of laymen on a school board can remove or ban a book from the school libraries because it offends their personal sensibilities. A school board must comply with the First Amendment. The action of the District No. 25 Board in removing DOWN THESE MEAN STREETS from the junior high school libraries, for which it had been selected by the District's professional librarian, infringed the right of circulation protected by the First Amendment. Moreover, the Statute and Regulations on which the order depended were so vague and ambiguous as to violate the First and Fourteenth Amendments. The District and Circuit Courts correctly recognized that they had jurisdiction to decide the substantive constitutional issues presented, on the merits.

II. The Board's actions violated the First Amendment right of the author and publisher to have the book which had been selected by the professional librarian circulated in the school libraries of District No. 25.

III. The Board's action violated the First Amendment rights of the District's libraries, teachers and students.

POINT I

The Board's Order Violated First Amendment Rights.

(i) The Nature and Scope of the Issue

The Court of Appeals turned the issue inside out when it suggested it was protecting "academic freedom" by sustaining the Board's order. It said that "Academic freedom is scarcely fostered by the intrusion of three or even nine federal jurists making curriculum or library choices for the community of scholars."

What actually happened was that five laymen, a majority of the Board, intruded on the academic freedom of the professional librarian and teachers—the real "community of scholars"—who had selected DOWN THESE MEAN STREETS for the libraries of District 25's three junior high schools. And the real issue is whether that "intrusion", by laymen on the community of scholars—on its face, and absent any specific and clear-cut statutory guidelines—violated the First Amendment rights of the author and publisher, the librarian and teacher, the parents and students—and the public of the School District.

The members of the District 25 Board were not scholars or experts in curriculum and library selection. Nor did they evidence any expertise in (or understanding of) First Amendment principles, or the application of these principles to book selection or book removal. They were far less qualified than Federal judges to decide whether DOWN THESE MEAN STREETS should be banned, or placed in coventry; although it was selected by professional librarians and teachers, had been well reviewed and recommended for teenagers, and did not violate New York laws against obscene material for minors.

The constitutional issue is, of course, far more extensive than the one book. The Court of Appeals denigrated the dispute, seeing it only as "ensuing shouts" in an "intramural strife" over the choice of books. What is really involved is the power of laymen, elected for a brief term, to remove or ban books from school libraries (throughout the State, and the country) because the books offend their personal sensibilities. Members of the New York City Community School Boards are elected for a two-year term (Sec. 2590-c, N. Y. Educ. Law). Under the Court's opinion, a new

majority could purge the junior high school library of books selected by this board (no less resanctify DOWN THESE MEAN STREETS as suitable for teenagers). And two years later, another transitory majority could remove or ostracize any book selected by librarians and teachers during the prior board's regime—and prevent or restrict their circulation by the libraries, and thus the right of teenage students to read them. Moreover, the Court of Appeals opinion gives school board majorities carte blanche to ban books (selected by the professional staff) which offend their personal political or social sensibilities, as well as those which describe life in a ghetto so vividly as to upset them.

When a handful of laymen, temporarily ensconced as a "school board", decide that a book of general interest must be removed from the library shelves of a school system, or barred from those shelves—they are taking an official action which affects rights to publish, circulate and read the book, rights which are protected by the First Amendment. The board's action must not, in itself, violate the First Amendment and the regulations and guidelines under which it is taken must not violate the First Amendment. We respectfully submit that on both counts, the District 25 order was unconstitutional.

(ii) A School Board Must Comply with the First Amendment

In *Tinker* v. *Des Moines School District*, 393 U.S. 503, 507 (1969) the Court emphasized that the Bill of Rights applies to the State "and all of its creatures—Boards of Education not excepted" and that their duty to

> ". . . educat(e) the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free

mind at its source and teach youth to discount important principles of our government as mere platitudes."

(iii) The Board's Order Violated the Right of Circulation protected by the First Amendment

The Court has held that the First Amendment protects "the circulation of books as well as their publication. *Lovell* v. *Griffin*, 303 U.S. 444, 452 . . ." *Bantam Books* v. *Sullivan*, 372 U.S. 58, 65 (1963). Otherwise the State could compel books to be published in a vacuum, by banning their circulation—thus suppressing the author's freedom to communicate with the public.

The "circulation" of books by school and public libraries is essential to the process of communication protected by the First Amendment. For Americans in schools and colleges, it is the paramount means of circulation, far exceeding book stores in importance and reach. If the Queens District Attorney had prosecuted a District 25 school librarian for distributing DOWN THESE MEAN STREETS, or threatened prosecution, the Federal Courts would have acted to prevent that restraint on the First Amendment right to circulate the book to teenagers [since it was not obscene under the standards of *Ginsberg* v. *State of New York*, 390 U.S. 629 (1968)]. See cases collected in note 8 at p. 67, *Bantam Books* v. *Sullivan*, supra.

The Board's order was also a restraint on that right of circulation. DOWN THESE MEAN STREETS was on the District 25 library shelves and was being circulated when the Board acted—to take it off the shelves and prevent it from being circulated and read. This was a deliberate and official restraint on that right of circulation. The book had

not become "obsolete", any more than the "Barrio" whose life it depicted. Indeed, the Board did not claim to remove the book because it was obsolete or because the shelf space was needed for other books. The Board's majority terminated the book's right to be circulated through the school's libraries because they were offended by its language and its portrayal of life in a New York ghetto.

It must be emphasized that here the Board was removing a book already selected; not refusing to approve the purchase of a book not yet on the shelves. Certainly where a transitory majority of a school board acts to *remove* or *restrict* a book already selected and circulating, the minimal protection the First Amendment requires (in addition to the safeguards discussed in IV *infra*) is a clear-cut statement by the Board of the specific educational factors on which it bases its action, to guard against the obvious danger that the majority may order book removals or bans because of its personal political or social viewpoints rather than sound educational considerations.

Moreover, the Board's actions in first removing the book (a power which the Court of Appeals clearly held it possessed) and then directing it could only be loaned to parents were both unconstitutional. The latter step prevented students from having access to the book; and placed a taint on it which is likely to discourage the timid parent or student from requesting this now "forbidden fruit." This type of restraint by inhibition was held unconstitutional in *Lamont* v. *Postmaster General*, 381 U.S. 301, 309 (1965). It effectively restrains the author's and publisher's right to have the book circulated to those who want to read it. cf. *Bantam Books* v. *Sullivan*, 372 U.S. 58 (1963).

(iv) The Statute and Regulations underlying the order violated the First Amendment

The statutory sanction for the Board's action was so vague and indefinite as to restrain rights guaranteed by the First and Fourteenth Amendments. *Winters* v. *New York*, 333 U.S. 507, 509 (1948). Here the School Board acted as legislator, judge and jury. The basis for its action was not even a vague regulation. The only standard for judging the book was the subjective opinions of some of the Board members.

According to the Circuit Court, the Board's action was authorized under a Regulation of the New York Commissioner of Education and Sec. 2590-e(3) of the New York Education Law. The Law gives the Board power to "determine matters relating to the instruction of students, including the selection of textbooks and other instructional materials . . ." provided they are approved by the Chancellor. The Commissioner's regulation says that secondary school book collections "shall consist of books approved as satisfactory for (1) supplementing the curriculum (2) reference and general information (3) appreciation and (4) pleasure reading." (8 N.Y. Code, Rules & Regs.) (Educ. Sec. 91.1(b) (1966).

We respectfully submit that these broadly worded provisions afford no standards whatsoever to guide laymen in applying First Amendment principles when deciding whether to remove or bar "reference and general information" books from the libraries of their district schools (even though the books have been approved by the Chancellor and selected by professional librarians and teachers). The unlimited power of selection or banning gives the transitory

majority of a board great opportunities to impose their personal social and political views on the teachers and public of the school district, through the selection process—thus restraining the constitutional rights to circulate and read books. The First Amendment requires that the standards guiding these lay officials in this sensitive work be specific, not vague and ambiguous. *Bantam Books* v. *Sullivan*, 372 U.S. 58, 66 (1963); *Shelton* v. *Tucker*, 364 U.S. 479, 488-9 (1960); *Speiser* v. *Randall*, 357 U.S. 513, 525 (1958). Certainly the statute and regulation empowering the Board's book-banning order do not meet these First Amendment requirements. Moreover, the Regulations and Statute do not provide adequate procedural safeguards. *Freedman* v. *Maryland*, 380 U.S. 51 (1965).

(v) The District Court had Jurisdiction to Decide these First Amendment Issues

The Circuit Court, in deciding the substantive issues involved, recognized that the District Court had jurisdiction of the controversy. That is consistent with the New York courts' interpretation of Sec. 310 of the New York Education Law, which permits administrative appeals to the Commissioner of Education from decisions of District School Boards (including those involving book selection or banning). The New York courts have consistently held that where a constitutional issue, or the legality of an administrative ruling, is involved, those aggrieved may appeal directly to the courts and need not first exhaust this "administrative" remedy. *Board of Education, Otego* v. *Rickard, et al.*, 32 A D 2d 135, 300 N.Y. Supp. 2d 472 (3d Dept., 1969); *Matter of Figari* v. *N. Y. Tel. Co.*, 32 A D 2d 434, 303 N.Y. Supp. 2d 245 (2d Dept. 1969).

As Mr. Justice Brennan declared in *Jacobellis* v. *Ohio*, 378 U.S. 184 (1964), in cases

> ". . . involving rights derived from the First Amendment guarantees of free expression, this Court cannot avoid making an independent constitutional judgment on the facts of the case as to whether the material involved is constitutionally protected." (p. 190)

Moreover since the Board's action was unconstitutional, the plaintiffs were not compelled to exhaust whatever "administrative remedies" might have been available to them. *Staub* v. *City of Baxley*, 355 U.S. 313 (1958). To require the plaintiffs to undergo the expense and burden of additional "administrative" procedures before they could turn to the courts for protection of First Amendment rights would seriously diminish those vital rights.

POINT II

The Board Violated the First Amendment Rights of the Author and Publisher of DOWN THESE MEAN STREETS.

The Court has upheld the right of authors and publishers to oppose restraints directed at others who distribute and circulate their books, since these measures infringe the First Amendment freedoms of the writer and his publisher. *Bantam Books* v. *Sullivan*, 272 U.S. 58 (1963).

The author and publisher of DOWN THESE MEAN STREETS were not parties to the action. But the plaintiffs had standing to ask for the protection of the First Amend-

ment rights involved, whether these be considered "their" rights, those of the author and publisher—or rights existing "for the benefit of all of us." (*Time, Inc.* v. *Hill*, 385 U.S. 374, 389). Moreover, the Authors League, as *amicus curiae* in the District Court and Circuit Court, urged that the Board's order be vacated because it violated the author's and publisher's First Amendment rights, as well as those of the students, teachers and parents.

In *Barrows* v. *Jackson*, 346 U.S. 249, 257 (1953), the Court held that there are unique situations in which the parties to a suit may assert the constitutional rights of others who are not before the Court. The Court observed that there are situations "in which it would be difficult if not impossible for the persons whose rights are asserted" to present their grievances (at p. 257). (See also: *Pierce* v. *Society of Sisters*, 268 U.S. 510). Since a book can be subject to innumerable local restraints and actions designed to inhibit its circulation, it is often economically impossible for its author or publisher to directly protect their First Amendment rights by defending every suit or proceeding aimed at the book. The only effective safeguard for an author's and publisher's freedom of expression in a particular community may be the claim of First Amendment protection for their book by teachers, students, librarians or readers, in the community, who choose to defend it against unconstitutional restraints upon its circulation.

POINT III

The Board's Order Violated the First Amendment Rights of the District's Teachers and Students.

The Board has treated as "a mere platitude" the First Amendment rights of libarians and teachers to circulate to students books which they, in their professional judgment, deem suitable. Their rights were infringed by the Board's order, and must be protected. In *Epperson* v. *Arkansas*, 393 U.S. 97 (1968) the Court said:

> " '[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools,' *Shelton* v. *Tucker*, 364 U.S. 479, 487 (1960). As this Court said in *Keyishian* v. *Board of Regents*, the First Amendment 'does not tolerate laws that cast a pall of orthodoxy over the classroom.' 385 U.S. 589, 603 (1967)." (p. 104)

> "It is much too late to argue that the State may impose upon the teachers in its schools any conditions that it chooses, however restrictive they may be of constitutional guarantees. *Keyishian* v. *Board of Regents*, 385 U.S. 589, 605-606 (1967)." (at p. 107)

The Board's order also infringed the First Amendment rights of the District's junior high school students. In *Lamont* v. *Postmaster General*, 381 U.S. 301 (1965) the Court held that the First Amendment protects the rights to receive and read literature, as well as the rights to publish and circulate. These rights apply to the students who use the District junior high school libraries, as well as to adults who use public libraries. In *Tinker* v. *Des Moines School District*, 393 U.S. 503 (1969), the Court said:

> "First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate. This has been the unmistakable holding of this Court for almost 50 years." (at p. 506)

As the Court noted, "The principle of these cases is not confined to the supervised and ordained discussion which takes place in the classroom." (at p. 512) It applies to other aspects of education. One of the most important of these, we submit, is the reading a teenage student does in his school library; ". . . it is also an important part of the educational process." (at p. 512) The library makes available to students a wide range of books, with a rich diversity of ideas and viewpoints, rather than "supervised and ordained" reading of text books. It permits:

> ". . . train (ing) through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.' " *Keyishian* v. *Board of Regents*, 385 U.S. 589, 603 (1967)

The students' freedom to read Down These Mean Streets in District 25's libraries was unconstitutionally restrained by the Board's order, and by the Statute and Regulation which sanctioned the order.

CONCLUSION

It is respectfully submitted that the Petition for Certiorari should be granted.

Respectfully submitted,

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